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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1438

SOLITRON DEVICES, INC.,
Petitioner,

against

THE ISLAND TERRITORY OF CURACAO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 22, 1974.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondent Island Territory of Curacao ("Curacao"), a political entity of the Netherlands Antilles and thus part of the Netherlands Kingdom, in opposition to the petition of Solitron Devices, Inc. ("Solitron") a New York corporation, for a writ of certiorari to review a judgment (C 1),* on an unanimous opinion, of the Second Circuit United States Court of Appeals entered in the above-entitled proceeding on December 26, 1973.

Opinions Below

The opinion of the District Court, Southern District of New York (Wyatt, J.), is printed in the petition (A 24) and reported at 356 F. Supp. 1 (February 14, 1973).

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* Letters and numbers in parentheses refer to appendix to petition unless otherwise indicated.

The opinion of the Second Circuit Court of Appeals (Kaufman, Ch. J., Smith and Oakes, C. JJ.), unanimously affirming the judgment below, is printed in the petition (A 1) and reported at 489 F. 2d 1313 (December 26, 1973).

Question Presented

Is a money judgment of a court of a foreign country (Curacao) enforceable in New York State under New York's Uniform Foreign Country Money-Judgments Recognition Act where such judgment was entered on an arbitration award made pursuant to a written agreement between Curacao and Solitron containing a broad arbitration provision with respect to all disputes thereunder, a submission by Solitron to the jurisdiction of Curacao for all matters pertaining to the agreement and the enforcement thereof and a consent to the applicability of the laws of the Netherlands Antilles after due notice to Solitron of the commencement of the arbitration, the hearing, the award and the entry of judgment thereon?

Both the District Court and the Court of Appeals answered this in the affirmative.

Statement of the Case

Solitron's statement of the nature of the case as one involving an interpretation of the Convention to enforce foreign arbitral *awards*, to which our government is a party, ignores the Second Circuit's opinion which addressed itself to the question of the enforceability of the Curacao *judgment* under New York's Uniform Foreign Country Money-Judgments Recognition Act (B 15).

Practically the entire opinion of the Second Circuit is a point-by-point analysis (and refutation) of Solitron's objections to the enforceability of the Curacao judgment under

the New York foreign judgments statute. The Court upheld the judgment stating:

> "Thus we conclude that the judgment of Curacao was enforceable under Article 53 of the New York Civil Practice Law and Rules and affirm the district court on this ground. In so holding we need not determine the correctness of the alternative ground advanced by the district court that the arbitration award was independently enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, by virtue of 9 U.S.C. §201 et seq." (A 20)*

Statement of Facts

Solitron, a New York manufacturer of electronic devices, and Curacao entered into a contract, for their mutual economic benefit, pursuant to which Curacao agreed to establish an industrial park of about 60 acres and to construct two factory buildings in accordance with Solitron approved plans for Solitron's use pursuant to a 20-year lease at a stipulated annual rental. Curacao further agreed to build an access road and sea waterpipes to the building sites. Solitron obligated itself under the carefully drawn and detailed agreement to "create at least one hundred (100) jobs" and to establish industries which would employ at least 3,000 persons born in the Netherlands Antilles. (Joint Appendix to Court of Appeals [hereinafter referred to as "Joint Appendix"] p. A 15.) The agreement was negotiated and signed in Curacao by the parties (A 26). Nowhere in the contract between the parties is there anything with

* Solitron argued, in its reply brief below, that an arbitral award under the type of contract in this case is only enforceable under the Convention on the Settlement of Investment disputes (A 8) which is not the Convention it urges in its instant petition was wrongly interpreted and which it claims preempted New York's foreign judgment statute. Solitron has apparently abandoned this argument as the same is not referred to anywhere in its petition.

respect to wages to be paid Solitron's employees or the prospective stablization of same as a condition precedent to the continuance of the contract. Solitron in its petition nowhere refers us to any contractual provision referrable to wages but its obligation to create at least 100 jobs is unquestioned.

A separate and detailed article in the agreement (Joint Appendix, A 20-21) provided for arbitration as the mode of resolving all "legal as well as factual" disputes arising thereunder, the procedures of which are not dissimilar to ours.*

Curacao fully performed on its part and constructed the two buildings, the access roads, etc. It is not disputed that Solitron refused to enter into a lease agreement and perform other obligations under the agreement (A 4). Accordingly, Curacao by letter dated April 13, 1970 addressed to Solitron's irrevocably designated agent in Curacao declared a dispute resulting from Solitron's breach and invoked arbitration pursuant to the contract. Solitron's conceded refusal and failure to perform under the agreement was predicated, it contended, on disorders occurring in the second half of 1969 in Curacao resulting in an upgrade of minimum wages (A 30) rendering performance of the agreement impossible (A 5). Admittedly, Solitron as a company in the electronics industry was exempted from the new minimum wage law. (Joint Appendix, p. A 25)

Arbitrators were then named as provided by the contract. Solitron refused to participate in the arbitration,

* Eg. a) Each party selecting one arbitrator and both arbitrators selecting a third as in 9 U.S.C. §5 and N.Y. CPLR §7504; b) limited time (4 months) within which to render a decision; c) arbitrators not bound by "rigid rules of the laws of the Netherlands Antilles" which laws applied to the agreement. New York's Court of Appeals has said: "Arbitrators are not bound by principles of substantive law or rules of evidence." *Lentine* v. *Fundaro*, 29 N.Y. 2d 382, 385, 328 N.Y.S. 2d 418, 421 (1972).

and claimed a revocation of authority of its designated agent. But, as the District Court pointed out, "the agreement, however, does not permit any such revocation" (A 31). Moreover, the attempted revocation followed Curacao's invocation of arbitration.

Prior to the arbitration, Solitron was advised by a number of letters, addressed to both its Curacao agent and to its New York office, of the arbitration, the designation of arbitrators and the date set for a hearing (A 5; Joint Appendix, pp. A 27-A 32, inclusive).

Hearings were held by the arbitrators over a three-day period and an exhaustive opinion was then rendered by them which not only detailed Curacao's claims, but carefully considered Solitron's defenses and claims as well despite Solitron's boycott of the proceedings. In Judge Wyatt's words:

> "The award gives every indication of able, careful and impartial work by the arbitrators." (A 38)

The arbitrators rejected Curacao's claim for costs of prosecuting the arbitration, reduced various claims of Curacao in some instances in their entirety and allowed Solitron a set off for many of the very items which Solitron later referred to in its counterclaim asserted in its answer in the District Court (A 20, A 46).

Damages were awarded to Curacao for various construction costs, rent and failure to create the contractual 100 jobs. The arbitrators allowed Solitron a set off for the value of items of equipment shipped by Solitron to Curacao. As indicated, the arbitrators considered, and rejected, the defenses raised by Solitron in correspondence had with Curacao, including *force majeure* and fraud in the inducement in entering into the subject contract. We note that except for damages for failure to create 100 jobs, Solitron in its petition herein acknowledges that the

other damage items (including its set off) constitute "the *commercial* aspects of this arrangement". Petition, p. 7 (emphasis added).

After the award was made, Curacao in accordance with the law of the Netherlands Antilles filed the original award in the Court of First Instance. A Writ of Execution was then issued by the Court which declared the award to be enforceable, i.e., a judgment of the Court. The Antilles' law permitted Solitron to move within three months thereafter to vacate or modify the award on grounds which include, in the main, those set forth in Title 9 U.S.C., Sections 10 and 11 (B 10-11) and Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (B 3-4) and New York's foreign judgment enforcement statute (B 16). Solitron did not institute any such proceeding or action and the award and judgment entered thereon became final (A 39; Joint Appendix, A 8, par. 18).

Subsequently, the Southern District Court granted Curacao's application to confirm the award and, alternatively, enforce the Curacao judgment to collect same from Solitron, a New York corporation principally based within the jurisdiction of the Southern District, and judgment was accordingly entered (C 2). The Second Circuit Court of Appeals unanimously affirmed the judgment below on the basis that the Curacao judgment was enforceable under New York law.

Reasons For Denying The Writ

The considerations set forth in this Court's rule governing review on certiorari, though not limiting the discretion of the Court, do support a denial of certiorari in our case (Rule 19.1(b)). We submit that none of the guidelines set forth therein apply here. There is no conflict between the Second Circuit's decision in this case and any other

court of appeals. There is no decision of an important state question in any way in conflict with applicable state law. There is no decision on an important question of federal law which has not been, but should be, settled by this Court. Nor has a federal question been decided in conflict with applicable decisions of this Court. We have here a decision of a court of appeals applying state law, i.e., New York's foreign judgment enforcement statute, in reliance upon the relevant case law of New York pertaining to said statute.

Solitron in its petition claims an "ambiguity" in the Convention on the recognition and enforcement of foreign arbitral awards regarding the meaning of commercial relationships and "conflicting" or "inconsistent" state provisions. These are the bases upon which it bottoms its petition. Interestingly (and inconsistently) Solitron, in its answer in the District Court, considered the award made by the arbitrators to be unenforceable under the Convention "because it has merged in a judgment rendered by the Court of First Instance of Curacao and is no longer a subsisting award" and asserted this as a defense (Joint Appendix, p. A 69). In any event, Solitron's contentions are in reality straw men since there has been no showing in its petition of ambiguity nor any demonstration of conflicting or inconsistent state provisions. The presumed ambiguity and state conflict, moreover, are matters which were not reached or decided by the Second Circuit.*

In short, what was construed and decided was the applicability of a New York statute in accordance with the decisional law of New York—nothing more.

* Solitron in its petition (p. 16) has, we submit, misstated the thrust of the Second Circuit's opinion in that, contrary to its assertions: a) the Court did not assume, and then proceed on the basis of, a conflict between New York's standard of recognition of foreign judgment based on foreign awards and the treaty and federal standards, and b) the Court did not address itself to the question of New York's recognition of a foreign award versus a foreign judgment based on an award.

I.

The determination of the Second Circuit of the enforceability in New York of the Curacao Money Judgment is based upon well established principles of law.

The Court of Appeals applying New York law to enforce a foreign judgment in favor of a foreign entity against a New York corporation concluded "that the judgment of Curacao was enforcable under Article 53 of the New York Civil Practice Law and Rules" and affirmed the District Court on that ground (A 20). In doing so the Second Circuit relied upon such cases as *Gilbert* v. *Burnstine*, 255 N.Y. 348 (1931) and *New Central Jute Mills* v. *City Trade and Industries, Ltd.*, 65 Misc. 2d 653, 318 N.Y.S. 2d 980 (Sup. Ct. 1971), among others. In *Gilbert* the New York Court of Appeals upheld the enforcement of a foreign judgment based on an English arbitration award. In *New Central Jute Mills* a foreign judgment based on an Indian arbitration award was granted enforcement under Article 53 of New York's CPLR. Article 53 by which the Curacao judgment was granted enforcement represents a codification, and not a reformation, of existing decisional law respecting recognition of foreign countries' judgments. Judicial Conference Report, 2 McKinney's Session Laws of New York 2784 (1970).

In *Gilbert*, supra, 255 N.Y. 348, 357, a unanimous court held:

> "Public policy, therefore, would not forbid defendants to appoint an agent to accept service . . . If the fact be clear that in advance of . . . arbitration they actually intended to contract that in the event of such a proceeding they would render themselves subject to foreign process, the same policy ought to prevail . . . We will not entertain the theory that, when they agreed to arbitrate at London according to the English Arbitration Act, they contracted with a reserva-

> tion to refuse to place themselves on English soil and to resist the English law outside that territory."

In accord: *National Equipment Rental Ltd.* v. *Szukhent*, 375 U.S. 311 (1964); *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268 (2d Cir. 1971).

Post-dating the enactment of New York's foreign judgment enforcement statute is the case of *New Central Jute Mills* v. *City Trade & Industries, Ltd.*, 65 Misc. 2d 653, decided by the New York Supreme Court. After restating the well-settled rule that:

> "Recognition is accorded to the foreign judgment whether entered after an adversary proceeding or upon default.
>
> • • •
>
> "Hence, once parties have agreed to submit their controversey to a foreign arbitrator, and to be bound by foreign law, they cannot relitigate their claims or defenses in domestic litigation." (65 Misc. 2d at 655)

the Court then very carefully explained how Article 53 gave statutory sanction to the Rule (at 655-657).

In *New Central Jute Mills* the court rejected the defendant's attempt to relitigate the foreign action:

> "It is clear, therefore, that any and all defenses available to the defendant had to be raised in the Indian courts, or not at all . . . Defendant . . . was placed on notice that plaintiff was seeking to confirm the [arbitration] awards and enter judgment in the High Court at Calcutta. Defendant chose deliberately not to assert any such defense, and to ignore the Indian proceedings. This, the defendant did even though it had a written agreement that all disputes were to be settled by proceedings in India . . .
>
> "Having been amply notified of the plaintiff's intention to proceed with the confirmation of the awards in India, defendant now can hardly claim to have been defrauded or misled. Nothing in this record indicates that the Indian judgment obtained

> by the plaintiff is repugnant to the public policy of this State nor, more than ample notice having been accorded to defendant at all times, can it be claimed that the judgment rendered was incompatible with our notions of due process." (At 657)

Here, as we have seen, Solitron deliberately defaulted in the arbitration proceeding and further defaulted in moving against the judgment within the requisite period of time after entry in the court in Curacao. It can hardly be heard to complain now.

Other points were raised below by Solitron in attacking the enforceability of the judgment under New York law. These were treated seriatim by the Second Circuit (A-11 to A-20, inclusive) and rejected. Since Solitron has not pressed them in its petition, we need not discuss them here with the exception of the damage award made for failure to create jobs. (Point I of the Petition.) The salient point is that the Second Circuit addressed itself to the question of whether under New York law (statutory and decisional) the Curacao *judgment* may be enforced.

Solitron's quarrel, in essence, is simply with the measure of damages flowing from the breach of one particular, conceded contractual obligation, the agreement to create 100 jobs. The award and judgment constitute nothing more than the application of a rule of contract law over one hundred years old concerning what damages consequentially flow from a breach of contract. *Hadley* v. *Baxendale,* 9 Exch. 341 (1854). Moreover, as the Second Circuit held (A 16):

> "Any objections to this method of computing damages or to the assumptions made by the arbitrators could have been presented to them or, indeed, might well have been presented in judicial proceedings which could have been brought by Solitron to annul the arbitration award in Curacao. They come too late here, however, and they by no means take into account the proposition to the contrary—which

> we need not pass upon—that, by virtue of the institutional nature and commercial relationship of the parties, remembering that Curacao itself was a government with large numbers of unemployed people, the method of ascertaining damages may well have been a fair and proper one. Solitron points to no New York statutory law that adopts a policy contrary to that agreed to by the parties here in their contract and implemented by the arbitrators. In this posture, Solitron's argument under state law must fail, see *in re Exercycle Corp., supra* [9 N.Y. 2d 329]; *New Central Jute Mills Co.* v. *City Trade & Industries, Ltd., supra,* in this concluded arbitration proceeding. Cf. *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.,* 274 F. 2d 805, 808 (2d Cir.), cert. denied, 363 U.S. 843 (1960)."

Thus, it would appear that if the contract provided for arbitration in New York with New York law governing and the same award of damages for failure to create jobs was made, such award would be properly enforceable in New York and reducible to judgment. N.Y. Civil Practice Law & Rules, §7510.

Solitron's concern for the opening of the door "to domestic enforcement of foreign arbitral awards reflecting governmental expenditures" in alleged violation of the Convention on Foreign arbitral awards (Petition, Point I, p. 12) is a needless one. This case is *sui generis* dealing as it does with a very distinct contract which contained a conceded obligation on the part of one of the contracting parties to create a certain number of jobs.

Nothing, we would further note, is offered by Solitron to support the assertion that the award of damages flowing from breach of the job—creating obligation based on calculated employment benefits* does not arise out of a com-

* Figured only on the basis of 100 jobs, the agreement provides for "at least" 100 jobs, and extended only for a limited period (A 36) although the lease period was 20 years.

mercial, legal relationship mandated by the Convention to enforce foreign arbitral awards. That there is a legal relationship is undisputed. We are offered supposition and two New York cases which do not deal with the issue.* Even Solitron concedes, moreover, that all the other items of damage treated by the arbitrators were commercial in nature (Petition, p. 7).

In sum, then, what we have here is an award of money damages eventuating in a money judgment—not an injunction or an adjudication of territorial rights or other non-financial determination—owing to a breach of an agreement by one of two parties who entered into a legal relationship through the instrument of a written contract by which, if fully performed, both parties would financially benefit. It is hard to envisage anything more commercial than this even if one of the results for one of the contracting parties would result in increased employment. In this regard it is noteworthy that N.Y. CPLR §5301 (b) defines a foreign country judgment as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes,** a fine or other penalty, or a judgment for support in matrimonial or family matters".

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* *Cannata* v. *City of N.Y.*, 11 N.Y. 2d 210 (1962), appeal dismissed, 371 U.S. 4 (1962) (Constitutionality of a state condemnation statute upheld on its face and its application to the particular case.) *Courtesy Sandwich Shop* v. *Port of N.Y. Authority*, 12 N.Y. 2d 379 (1963), appeal dismissed, 375 U.S. 78 (1963) (Upheld validity of state statute authorizing condemnation for development of a trade center.)

** Contra to Solitron's hypothesis (Petition, p. 14).

II.

That the Federal Arbitration Act referrable to foreign arbitral awards did not abrogate alternate state remedies where the award is reduced to judgment is supported under existing statutes and case law.

The Court below was presented with the question of the enforceablity of the Curacao judgment and not solely, as Solitron would have it (Petition, p. 14), with the compass of the controversy under the Arbitral Convention. Solitron, in its main brief below, addressed itself in a separate point to an attack on the enforceability of the judgment under New York's foreign judgment enforcement statute. In our brief below we indicated that we rested not only on Title 9 U.S.C. §§201 et seq., but also on Art. 53 of New York's Civil Practice Law and Rules relating to enforcement of foreign judgments. In any event, the Second Circuit referring to Solitron's contention of preemption states (A 9-11):

> "The Convention on Recognition [of foreign arbitral awards] in no way purports to prevent states from enforcing money judgments, whether those judgments are rendered in the enforcement of an arbitration award or otherwise . . .
>
> "It is not insignificant that the Federal Arbitration Act itself makes a very clear distinction between action on an award and action on a judgment enforcing the award, pointing out that application for an order confirming the award may be made only when 'the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . .' and on certain other conditions, subject to certain other qualifications. 9 U.S.C. §9. This very important difference was, indeed, the key to our own recent decision in *Varley* v. *Tarrytown Associates, Inc.*, 477 F. 2d 208 (2d Cir. 1973), where we held that, because

> the parties in their contract to arbitrate had not agreed that a judgment of the court could be entered upon the award, there was no consent to the entry of judgment thereon. We hold, then, that, since the Convention on Recognition itself and its enforcing legislation go only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards, New York State law is not preempted to the extent that it permits, regulates and establishes a procedure for the enforcement of the foreign money judgment. Thus it cannot be doubted that the policy of New York State to recognize foreign judgments 'prevails in the absence of interference with the federal regulatory scheme'. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 42 *U.S.L.W.* 4021, 4028 (U.S. Dec. 4, 1973)."*

See also, *Landegger* v. *Bayerische Hypotheken Und Wechsel Bank*, 357 F. Supp. 692 (S.D.N.Y. 1972) where summary judgment was granted on an application to enforce a German arbitration award in favor of a New York resident against a German bank applying New York law notwithstanding a treaty between the United States and the Federal Republic of West Germany seemingly covering the subject matter.

Interestingly, there is no federal foreign judgments enforcement or recognition statute. It is, therefore, recognized at least implicitly, that the enforcement of foreign money judgments is a proper area of state action and legislation. We note, too, that state procedures for the enforcement of arbitration awards have not been superseded by the federal arbitration act (Title 9 U.S.C. §§1-14) where, for example, parties agree to the jurisdiction of a particular court for the entry of judgment upon the award. In *Monte* v. *Southern Delaware County Authority*, 335 F. 2d 855 (3rd Cir.

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* Reported at U.S. , 94 S. Ct. 383, 396, 38 L. Ed. 2d 348, 366.

1964) the court reiterated its prior holding in another phase of the case (321 F. 2d 870 [3rd Cir. 1963]) that it was precluded from reviewing an arbitration award, although it had subject-matter jurisdiction, because the parties contractually agreed that review would be had only in the state courts of Pennsylvania. In our case an irrevocable designation of an agent in Curacao for implementation of the agreement "as well as for all acts of judicial execution" was made (Joint Appendix p. A 22) with Antilles' law applying. The Antilles' law provides for the entry of the arbitral award in Curacao's Court of First Instance and for all proceedings thereafter to be had in that court (eg. application to annul the award). (Joint Appendix, pp. A 61-64) See also, *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268, 1277 (2d Cir. 1971) where the court rejected Reed & Martin's contention that Washington State law is applicable on the court's jurisdiction over it because Washington State law was made applicable to the agreement involved. The Court held:

> "Since the parties did not agree on a court to which the case would be submitted, we look to the Federal Arbitration Act which, as noted above, confers jurisdiction over Reed & Martin in the Southern District of New York."

Ballantine Books, Inc. v. *Capital Distributing Co.*, 302 F. 2d 17, 20 (2d Cir. 1962) recognized a state court's jurisdiction concerning an arbitration, notwithstanding the federal court's concurrent jurisdiction in the following language:

> "Whether or not there might be situations where a state court has proceeded so far in the supervision of an arbitration that it would be an abuse of discretion for the federal court to intrude itself, such a situation is not here presented. Such discretion must be exercised and judged in terms of the practicalities of the situation."

That state and federal arbitration acts can coexist is illustrated by *Southern Bell Tel. & Tel. Co.* v. *Louisiana Power & Light Co.*, 221 F. Supp. 364, 368 (D. La., 1963)* where the prosecution of a third-party action in state court was enjoined because of an arbitration agreement between the third-party plaintiff and defendant. The court in *Southern Bell*, supra, did point out that the third-party defendant was within its rights to seek relief in the state court under the state arbitration statute and, if unsuccessful, assert its rights in the federal court under the federal arbitration statute, apparently on the basis that federal jurisdiction exists on diversity and amount-in-dispute grounds.

Solitron asserts in its petition, under its pre-emption point, that the Curacao judgment lacked legal foundation because a Marshal's Writ, issued about eight months after the award was rendered *and* entered in the Court of First Instance in Curacao as a judgment, contained a notation that Solitron was no longer domiciled there. (Joint Appendix, pp. A 56, A 57, A 83). Dispositive of this are, among other responses, the holding of the District Court (A 39) that under the subject agreement:

> ". . . Solitron specifically agreed to submit to arbitration in Curacao, agreed that the laws of the Antilles should be applicable, and agreed that for 'everything' connected with that agreement it had a Curacao 'domicile' and a resident agent for service of notice and process.
>
> "Under such an agreement, there was jurisdiction in Curacao to regulate the arbitration and to enter judgment on the award. There are controlling federal and New York decisions supporting this conclusion. *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-316 (1964); *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F. 2d 1268,

* Companion case, 309 F. 2d 181 (5th Cir.) (reversing an order dismissing the complaint on the doctrine of abstention), cert. denied 373 U.S. 952.

> 1276-77 (2d Cir. 1971); *Gilbert* v. *Burnstine,* 255 N.Y. 348, 247 N.Y.S., 174 N.E. 706 (1931); *New Central Jute Mills* v. *City Trade & Industries, Ltd.,* 318 N.Y.S. 2d 980, 984 (Sup. Ct., N.Y. Cty. 1971); CPLR § 5305(a)(3)."

Victory Transport Inc. v. *Comisaria General,* 336 F. 2d 354 (2d Cir. 1964), cert. den. 381 U.S. 934 (1965), is in accord with *Gilbert, supra.* In *Victory,* the Second Circuit upheld the District Court's order compelling arbitration where both parties had, in writing, consented to submit any dispute to arbitrators at New York. The party attacking arbitration was "an arm of the sovereign government of Spain" (at 336 F. 2d 357) and the party seeking arbitration was apparently a private corporation. It was held that *in personam* jurisdiction over Comisaria General [Spain's Ministry of Commerce] existed in New York because of the consent to arbitrate disputes there. Additionally, the Second Circuit (A 14) held *inter alia,* in rejecting Solitron's argument concerning the foreign judgment:

> "3. The language of the Curacaoan marshal's writ in context at most constitutes an acknowledgment of the fact that the attempted revocation in May of 1970 had become effective by the date of the marshal's writ in April of 1971 (a matter which we need not and do not affirmatively decide here). That is to say, the marshal's language to the effect that the respondent is no longer domiciled in the Netherlands Antilles relates to the time of the issuance and presentation of the writ in April 1971."

Finally, and notably, Solitron nowhere in its petition demonstrates its contention of "inconsistency" between the foreign arbitral award convention and the laws of New York State. We do note similar, if not identical, provisions in New York's arbitration statute (CPLR § 7501 et seq.) and the federal arbitration statute (9 U.S.C. § 1 et

seq.). Moreover, with respect to one of Solitron's principal defenses asserted below, i.e., fraud in the inducement of the agreement containing the broad arbitration provision, both New York decisional law applying New York's arbitration statute* and this Court's holding applying the federal arbitration statute* are in accord.

Reliance by Solitron for Point II of its petition on *Hines* v. *Davidowitz*, 312 U. S. 52 (1941) is, we submit, misplaced. *Hines* dealt with dual alien registration statutes, one federal and one state (Pennsylvania). Here we do not have such duality since New York's statute relates to judgments and the federal statute relates to arbitral awards. The legislation under review in *Hines* dealt with an area of international consequence long the subjects of congressional action, i.e., immigration and aliens. In *Hines* this Court recognized that state laws may validly treat of the same subject as federal laws. The Court in *Hines* stated (at 312 U. S. 67):

> "Our primary function is to determine whether under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."

In any event, we submit that the purposes of Congress under the Convention on foreign arbitral awards would be subverted by denying enforceability to an award properly reduced to a judgment in the foreign country in accordance

* *Weinrott* v. *Carp*, 32 N.Y. 2d 190 (1973); *Prima Paint Corp.* v. *Flood & Conklin*, 388 U.S. 395 (1967): Fraud in the inducement is a question for the arbitrators.

with jurisdictional dictates and the parties' contract.* This is reflected in a House Report on Chapter 2, Title 9 U.S.C., concerning the Convention (2 U. S. Code Congressional and Administrative News 3601, 3602-91st Cong. Second Session 1970):

> "In the committee's views, the provisions of S. 3274 [Chap. 2, Title 9] will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for *awards which can be enforced in both U. S. and foreign courts.*" (Emphasis added.)

An alliance of purpose of the enactment of Art. 53 of New York's CPLR with Chap. 2, Title 9 U.S.C., is shown by the following comment in the Judicial Conference Report on the proposed Article 53 (2 McKinney's Session Laws of New York 2784 [1970]):

> "It is the opinion of experts in the field of international litigation that this codifying legislation would answer the reciprocity requirements of many foreign countries and would therefore result in obtaining better treatment for New York citizens engaged in litigation abroad."

Thus, there is no departure in this case from existing law and, accordingly, no warrant for the granting of the petition herein.

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* The case of *Sargant* v. *Monroe*, 268 App. Div. 123, 49 N.Y.S. 2d 546 (1st Dept. 1944), also relied upon by Solitron in Point II of the petition, is inapposite since the appointment of the defendant's representative in London was "for all the purposes of the arbitration" but did not extend, as in our case, to "all acts of judicial execution". Moreover, *Sargant* was decided prior to an amendment to Sec. 1450 of New York's former Civil Practice Act which extended jurisdiction for entry of judgment on an award when New York has jurisdiction of the arbitration proceedings. See, *Bradford Woolen Corp.* v. *Freedman*, 189 Misc. 242, 71 N.Y.S. 2d 257 (Sup. Ct. 1971).

CONCLUSION

For the reasons stated we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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